The Prosecutor's Manual

Volume I

Chapter 6 – Plea Agreements

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Volume I, Chapter 6

Plea Agreements

I. INTRODUCTION

Approximately 85% of the criminal convictions in Arizona are the result of plea agreements. Although plea agreements are an essential component of the justice system, they are also a greater source of reported error than any other aspect of the justice system. That fact should encourage prosecutors to take an active part in the plea process to ensure that the defendant's plea is voluntary, knowing and intelligent. *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709 (1969). See generally *State v. Mott*, 150 Ariz. 79, 722 P.2d 247 (1986); *State v. Lamas*, 143 Ariz. 564, 694 P.2d 1178 (1985).

Some guilty plea requirements apply to admissions of prior convictions and probation or parole status. *State v. Rickman*, 148 Ariz. 499, 715 P.2d 752 (1986).

II. JUDGE'S RESPONSIBILITIES

A. The Judge Must Speak Directly to the Defendant in Open Court.

See *Boykin*, *supra*, for explanation about the constitutionality of making a clear record of the confession and waiver. See also 17 A.R.S. R.Crim.P., Rules 17.1 - 17.6.

B. He Must Inform the Defendant of:

1. Nature of the Charge

Factual details that determine the degree of the crime charged should be explained. However, there is no requirement that the trial court advise a defendant of each specific element of the crime to which he pleads guilty. *State v. Sodders*, 130 Ariz. 23, 633 P.2d 432 (App. Div. 1 1981). See also *State v. Young*, 112 Ariz. 361, 542 P.2d 20 (1975); *State v. Davis*, 112 Ariz. 140, 539 P.2d 897 (1975).

The only exceptions are where special circumstances exist. Severely impaired intellect or mental retardation of a defendant are special circumstances requiring the explanation of each essential element of the crime. *Henderson v. Morgan*, 426 U.S. 637, 96 S.Ct. 2253 (1976). In *State v. Young*, 112 Ariz. 361, 542 P.2d 20 (1975), a conviction was upheld even though the written plea agreement did not state the degree of rape to which defendant pled, because the trial court had informed the defendant of the factual elements which established the proper degree of the crime.

2. Rights Waived by an Accepted Plea

- Right to a preliminary hearing or other probable cause determination on the charges;
- Right to make any and all motions, defenses, objections, or requests he has made or raised, or could assert hereafter, to or against any matters preceding the court's entry of judgment and imposition of sentence;
- Right to a jury trial for the charged offense and any sentencing enhancements;
- Right to confront witnesses against him and cross-examine them;

- Right to present evidence and call witnesses in his defense, knowing that the State will compel witnesses to appear and testify;
- Right to be represented by counsel (appointed free of charge if he cannot afford to hire his own) at trial of the proceedings; and
- Right to remain silent, to refuse to be a witness against himself, and to be presumed innocent until proven guilty beyond a reasonable doubt.

3 Range of Sentence and Special Conditions

a. True Range of Sentence

The court must notify defendant about special conditions affecting sentences. Enhanced punishment sections, A.R.S. §§ 13-604, 13-604.01 and 13-604.02 are special conditions affecting sentencing, and the court must tell defendant of their effect. See generally *State v. Rickman*, 148 Ariz. 499, 715 P.2d 752 (1986). *State v. Lamas*, 143 Ariz. 564, 694 P.2d 1178 (1985) (reversible not to tell defendant enhanced punishment required him to serve entire 15 year sentence, instead of 5 years).

The court need not tell a defendant that if he pleads guilty to certain crimes, and then commits certain future crimes, he may be subject to a life sentence. *State v. Allie*, 147 Ariz. 320, 710 P.2d 430 (1985).

Another example of a special condition would be where the plea agreement called for a class 6 felony with no prison time. The court should tell the defendant that probation jail time could exceed the prison time defendant could have been given. *State v. Soto*, 126 Ariz. 477, 616 P.2d 937 (App. Div. 1 1980). See also *State v. Hansen*, 146 Ariz. 226, 705 P.2d 466 (App. Div. 2 1985) (questionable whether foreign defendant understood she would have to serve two-thirds of her sentence).

b. Parole Eligibility

The trial court is required to inform the defendant of the statutory conditions which affect eligibility for parole and early release. The trial court need not inform defendant of general parole provisions applying to everyone. *State v. Bryant*, 133 Ariz. 298, 650 P.2d 1280 (App. Div. 1 1982). See also *State v. Esquer*, 26 Ariz.App. 121, 546 P.2d 849 (App. Div. 1 1976) (statute denied eligibility for early release). See generally *State v. Wesley*, 131 Ariz. 246, 640 P.2d 177 (1982); *State v. Turner*, 141 Ariz. 470, 687 P.2d 1225 (1984).

The enhanced punishment sections are special conditions affecting parole eligibility, as well as true range of sentence. *State v. Rickman*, 148 Ariz. 499, 715 P.2d 752 (1986). Outlining the effect of the sentencing statutes in the plea agreement helps satisfy this requirement as well.

c Collateral Effects

The court need not explain the collateral effects of a defendant's guilty plea, such as the possibility of increased punishment if the defendant is later convicted of another crime. Some of the collateral consequences follow.

Defendant's guilty plea was not involuntary where the court did not tell defendant that defendant could be required to perform community service as a condition of probation. *State v. Carranza*, 156 Ariz. 188, 751 P.2d 38 (App. Div. 1 1988).

Defendant's guilty plea was voluntary even though the court did not tell defendant that if he was found to have committed a felony while on probation, A.R.S. § 13-604.02, the sentence could be consecutive to any sentence imposed for the crimes he was on probation for. It is unnecessary to tell defendants that a conviction on a subsequent offense may result in that sentence being consecutive to the sentence for the first offense conviction. *State v. Rushing,*156 Ariz. 1, 749 P.2d 910 (1988).

After the court rejected the proposed sentence from the plea agreement, the defendant went ahead with sentencing. His plea was voluntary even though the court did not tell the defendant of his Rule 17.4(g) right to disqualify the judge. *State v. Barnett*, 153 Ariz. 508, 738 P.2d 78 (App. Div. 1 1987).

d. Probation Revocation

Plea agreements concerning probation violation are permissible. *State v. Reidhead*, 152 Ariz. 231, 731 P.2d 126 (App. Div. 1 1986), as are agreements concerning probation violations. *State v. Flowers*, 159 Ariz. 469, 768 P.2d 201 (App. Div. 1 1989). However, agreements regarding probation violations are not the same as plea agreements; therefore, the strict requirements of Rule 17.4 do not apply. *Id.*

The trial court is not required to inform a probationer of all the consequences of his present plea if he is already aware of those consequences. In *State v. Harris*, 116 Ariz. 543, 570 P.2d 485 (1977), the trial court failed to inform the defendant before he pled guilty that his probation on an earlier charge could be revoked. The appellate court noted that the defendant had read and signed his probation papers which contained a clause stating that probation could be revoked if the probationer were not law-abiding. Held: trial court not required to inform the defendant of something of which he was fully aware.

e. Restitution

In a flurry of cases, the Arizona Supreme Court made restitution a key element in guilty plea cases. If restitution is a key element in a defendant's decision to plead guilty, then the defendant must either have been told the amount of restitution or have been told the maximum amount of restitution he could be required to pay. If the defendant did not know what restitution would be, from any source, and restitution was a key element, then the plea was involuntary. If restitution was not a key factor in the defendant's decision to plead guilty, and the defendant was not made aware by anyone or anything of what the restitution could or would be, then the defendant is entitled to a remand to determine the amount of restitution defendant should pay. *State v. Grijalba*, 157 Ariz. 112, 755 P.2d 417 (1988); *State v. Crowder*, 155 Ariz. 477, 747 P.2d 1176 (1987).

Imposition of restitution is mandatory. A.R.S. § 13-603(C). Restitution may be imposed even if the plea agreement is silent about restitution. *State v. Weston*, 155 Ariz. 247, 745 P.2d 994 (App. Div. 1 1987). Full restitution should be imposed even if the defendant is currently unable to pay. Defendant's circumstances may change, extensions are available, and the defendant can ask for relief. *State v. Fox*, 153 Ariz. 493, 738 P.2d 364 (App. Div. 2 1986).

Consequential damages are not recoverable under restitution statutes. A victim is not entitled to lost contract damages as part of restitution, nor can the court require a defendant to pay a civil judgment as restitution. *State v. Pearce*, 156 Ariz. 287, 751 P.2d 603 (App. Div. 2 1988).

Division One and Division Two are split over the issue of juvenile restitution. Division Two says that A.R.S. § 8-241(C)(1) gives more discretion than A.R.S. § 13-603(C), and struck the unknown restitution

part of the order. *Matter of Pinal County Juvenile Action No. J-985*, 155 Ariz. 249, 745 P.2d 99 (Ariz.App. 1987). Division One said restitution was mandatory and adopted a *Crowder* approach. *Matter of Maricopa County Juvenile Action No. JV-110720*, 156 Ariz. 430, 752 P.2d 519 (1988).

It is important to note that "it is an abuse of discretion for a sentencing judge to require restitution by a defendant for a crime in which there is no admission or adjudication of guilt or liability, unless the defendant, in a plea agreement or otherwise, consents to such restitution." *State v. O'Connor*, 146 Ariz. 16, 19, 703 P.2d 563, 566 (App. Div. 1 1985).

f. Fines

The court must inform the defendant of the maximum fine that can be imposed before the plea can be entered knowingly and voluntarily. *State v. King*, 157 Ariz. 508, 759 P.2d 1312 (1988).

C. Determine Factual Basis

Before the trial court may accept a guilty plea there must be a factual basis for every element of the crime. *State v. Carr*, 112 Ariz. 453, 454-55, 543 P.2d 441, 442-43 (1975); *State v. Varela*, 120 Ariz. 596, 587 P.2d 1173 (1978); *State v. Norris*, 113 Ariz. 558, 558 P.2d 903 (1976). See also *State v. Owens*, 127 Ariz. 252, 619 P.2d 761 (App. Div. 1 1980) (no contest plea); *State v. Johnson*, 142 Ariz. 223, 689 P.2d 166 (1984).

However, each element need not be explained to the defendant, absent special circumstances. *Henderson v. Morgan*, 426 U.S. 637, 96 S.Ct. 2253 (1976); *State v. Sodders*, 130 Ariz. 23, 633 P.2d 432 (App. Div. 1 1981); *State v. Ohta*, 114 Ariz. 489, 562 P.2d 369 (1977).

1. Explicit Fact-Finding Not Required

The record need only show that the trial court was sufficiently informed as to the factual basis of the plea. *State v. Bates*, 22 Ariz.App. 613, 529 P.2d 1207 (App. Div. 1 1975).

The factual basis need not be established beyond a reasonable doubt; the court need only find strong evidence of guilt. *State v. Hamilton*, 142 Ariz. 91, 688 P.2d 983 (1984). See also *State v. Ybarra*, 149 Ariz. 118, 716 P.2d 1055 (App. Div. 2 1986), abrogated on other grounds in *State v. Harrison*, 195 Ariz. 1, 985 P.2d 486 (1999).

2. Sources of Factual Basis

a. Verbal Evidence

The trial court is not limited as to the records which it can use in establishing a factual basis. There may be sufficient evidence brought out through questioning at the time the plea is accepted. *State v. Parle*, 110 Ariz. 517, 520, 521 P.2d 604, 607 (1974), cert. denied, 419 U.S. 1003 (1974); *State v. Miller*, 110 Ariz. 304, 508 P.2d 127 (1974). See also *Ybarra*, *supra*.

b. Sources Outside Case Record

Sources other than the record of the taking of the plea may be used to constitute a factual basis.

1) Presentence Report

State v. Huizar, 112 Ariz. 489, 490, 543 P.2d 1118, 1119 (1975); *State v. Geiger*, 113 Ariz. 297,

552 P.2d 1191 (1976); *State v. Ellison*, 169 Ariz. 424, 819 P.2d 1010 (App. Div. 1 1991); *State v. Limpus*, 128 Ariz. 371, 625 P.2d 960 (App. Div. 1 1981).

2) Report by Probation Officer

State v. Mendiola, 23 Ariz.App. 251, 532 P.2d 193 (App. Div. 1 1975); *State v. Vasquez*, 21 Ariz.App. 445, 520 P.2d 539 (App. Div. 1 1974).

3) Preliminary Hearing Transcript

State v. Huizar, *supra*; *State v. Snyder*, 25 Ariz.App. 406, 544 P.2d 230 (App. Div. 1 1976); *State v. Ellis*, 117 Ariz. 329, 572 P.2d 791 (1977). See also *State v. McVay*, *supra*; *State v. Hamilton*, *supra*.

4) Police Reports

State v. Salinas, 181 Ariz. 104, 106, 887 P.2d 985, 987 (1994); *State v. Ellis*, 117 Ariz. 329, 572 P.2d 791 (1977).

5) Evidence from Motions

State v. Sodders, 130 Ariz. 23, 25-26, 633 P.2d 432, 434-35 (App. Div. 1 1980).

6) Defendant's Admissions

State v. McVay, *supra*; *State v. Brooks*, 120 Ariz. 458, 586 P.2d 1270 (1978).

7) Prior Withdrawn Pleas

Even if defendant's admission the guns he sold were "hot" was insufficient, there was still a sufficient factual basis. In a transcript of a previous plea agreement, from which defendant withdrew, admitted all the elements. *State v. Brooks*, 156 Ariz. 529, 530, 753 P.2d 1185, 1186 (App. Div. 2 1988).

8) Miscellaneous Sources

"The factual basis may be determined from the extended record which may include presentence report, preliminary hearing transcripts, statements of the defendant, proceedings before the grand jury, and other sources." *Sodders*, *supra*. See also *State v. Ybarra*, 149 Ariz. 118, 716 P.2d 1055 (App. Div. 2 1986).

Statements of prosecutors. *State v. Salinas*, 181 Ariz. 104, 106, 887 P.2d 985, 987 (1994).

Records of a co-defendant. *State v. Johnson*, 181 Ariz. 346, 349, 890 P.2d 641, 644 (App. Div. 1 1995).

3. "Categoric Similarity"

The crime to which the defendant pleads guilty must be reasonably related to his conduct. *State v. Norris*, 113 Ariz. 558, 560, 558 P.2d 903, 905 (1976). This is to "assure an accurate criminal record for the defendant, and those who must deal with him in the future." *Id.* at 560, 558 P.2d at 905. See also *State v. Louden*, 127 Ariz. 249, 619 P.2d 758 (App. Div. 2 1980); *State v. McGhee*, 27 Ariz.App. 119, 551 P.2d 568 (App. Div. 1 1976). In any event, there must be a factual basis for each element of the crime. In *State v. Page*, 115 Ariz. 156, 564 P.2d 379 (1977), the court set aside the plea and reinstated the original charge where the original charge was possession of heroin and the plea was possession of dangerous drugs. Heroin was not statutorily defined as a dangerous drug, hence no factual basis to support the charge of possession of a dangerous drug.

4. Express Admission of Guilt Not Required

As long as there is a factual basis upon which to base acceptance of the plea, there is no requirement that the defendant admit guilt. *State v. Dixon*, 111 Ariz. 92, 94-95, 523 P.2d 789, 791-92 (1974). This type of situation is known as an *Alford* plea, based on *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160 (1970).

However, if the defendant protests his innocence and says things indicating he believes the guilty plea doesn't end things, the judge should advise him that pleas of guilty are final. *State v. Mott*, 150 Ariz. 79, 722 P.2d 247 (1986). Of course, all this presupposes that the defendant was competent enough to understand the consequences of entering a plea of guilty. See *State v. Anzivino*, 148 Ariz. 593, 716 P.2d 50 (App. Div. 1 1985).

5. Evidence Necessary

To accept a guilty plea, the court need only find "strong evidence" of guilt. It is not necessary to find guilty beyond a reasonable doubt. *State v. Hamilton*, 142 Ariz. 91, 688 P.2d 983 (1976); *State v. Varela*, 120 Ariz. 596, 587 P.2d 1173 (1978); *State v. Norris*, 113 Ariz. 558, 558 P.2d 903 (1976).

6. Factual Basis/Counsel for Prior Convictions

The state does not have to establish a factual basis for the prior convictions relied upon for enhanced punishment unless there is a flaw in the record. *State v. Cuzick*, 154 Ariz. 231, 741 P.2d 698 (App. Div. 1 1987). In order to challenge the validity of a prior conviction used to enhance a sentence in a guilty plea, the defendant must first challenge it at the trial level. Otherwise, the court will assume it is valid pursuant to the presumption of regularity. *State v. Anderson*, 160 Ariz. 412, 773 P.2d 971 (1989).

D. Determine Voluntariness

1. Specific Finding Not Necessary

Rule 17.3 requires that the trial court determine the voluntariness of the plea. However, a specific finding of voluntariness is not necessary although it sure makes life easier. The *Boykin* requirements are met when it appears from a consideration of the entire record that the plea and waiver were voluntary. *State v. Henry*, 114 Ariz. 494, 562 P.2d 374 (1977). Trial court must question defendant and ascertain voluntariness prior to accepting the plea. *State v. Tucker*, 110 Ariz. 270, 517 P.2d 1266 (1974).

Compare *State v. Anderson*, 147 Ariz. 346, 710 P.2d 456 (1985) (reversed, counsel told defendant mere formality to reopen case after plea); *State v. Mott*, 150 Ariz. 79, 722 P.2d 247 (1986) (plea upheld).

2. Voluntariness Implied From Record

The trial judge must be satisfied that the plea was voluntarily entered. On appeal, the record must affirmatively indicate that the judge was satisfied as to the requirement of voluntariness. However, this can appear on the record by implication. *State v. Campbell*, 107 Ariz. 348, 488 P.2d 968 (1971); *State v. Miller*, 11 Ariz.App. 457, 465 P.2d 594 (App. Div. 2 1970). See also *State v. Ybarra*, 149 Ariz. 118, 716 P.2d 1055 (App. Div. 2 1986) (plea agreement may be examined to determine whether appellant understood the rights he was waiving).

For instance, in *State v. Pritchett*, 27 Ariz.App. 701, 558 P.2d 729 (App. Div. 1 1976), the trial judge did

not specifically ask the defendant if the plea was the result of coercion or promises, but instead phrased his questions in terms of "Do you understand?" The court held this was a sufficient determination of voluntariness and noted that the record clearly indicated that no promises had induced defendant's plea. As a practical matter, a prosecutor should request the court make a finding on voluntariness if the judge forgets.

3. Coercion and Plea Bargaining

If the record indicates that the plea may have been involuntary, the trial court must establish a basis for its determination that the plea is in fact voluntary. Even if the coercion or threats inducing the plea have not come from the state, the court must inquire into the nature of the threats and their relation to the plea. See *State v. Hamilton*, 142 Ariz. 91, 688 P.2d 983 (1984) (no coercion by detectives). Threats or the fear of violence from others, such as co-defendants or their families, can render the plea involuntary. If there is minimal evidence or suggestion of coercion, the trial court must specifically determine voluntariness and the basis for that determination must clearly appear on the record. *State v. Hill*, 118 Ariz. 157, 575 P.2d 356 (App. Div. 1 1978).

A prosecutor may, in the course of a plea negotiation, confront a defendant with the possibility of a more severe penalty if he refuses to deal. In *Bordenkircher v. Hayes*, 434 U.S. 357, 98 S.Ct. 663 (1978), the court held that the Due Process Clause of the Fourteenth Amendment was not violated when a state prosecutor carried out a threat made during plea negotiations to re-indict the accused on more serious charges if he did not plead guilty to the original charge.

Other non-coercive cases include *State v. Ellis*, 117 Ariz. 329, 572 P.2d 791 (1977) (poor jail conditions); *State v. Parle*, 110 Ariz. 517, 521 P.2d 604 (1974) (death penalty); *State v. Nunez*, 109 Ariz. 408, 510 P.2d 380 (1973) (death penalty); and *State v. Peters*, 110 Ariz. 316, 518 P.2d 566 (1974).

Requiring everyone to plead guilty has been approved where everyone benefited. *State v. Solano*, 150 Ariz. 398, 724 P.2d 17 (1986). See the "Guilty Pleas Dependent on Pleas by Others" subsection.

Voluntariness has one last quirk. If the defendant keeps talking about getting his conviction reopened, be sure he is told on the record that Rule 32 or an appeal are not mere formalities. In *State v. Anderson*, 147 Ariz. 346, 711 P.2d 456 (1985), the defendant was waiting for lab test results which would prove his innocence, when he entered a plea. He kept talking about being able reopen his case and prove his innocence, and the plea was reversed. *Anderson* seems to have been limited to situations close to its facts. In the next case to come along, the Arizona Supreme Court reversed the Court of Appeals, which had followed *Anderson*. The Arizona Supreme Court said the defendant knew Rule 32 was more than a mere technicality barring reopening the case, whereas Anderson's lawyer told him that reopening the case to prove his innocence was a mere formality. *State v. Mott*, 150 Ariz. 79, 722 P.2d 247 (1986).

4. Promises to Induce Plea

The state may not include a provision allowing the defendant conjugal access in jail. The inclusion of such a provision demonstrates a degree of coercion that renders the plea involuntary. *State v. Horning*, 158 Ariz. 106, 761 P.2d 728 (App. Div. 1 1988).

Defendant unsuccessfully claimed police promised him a stay in a mental hospital for several years. Defendant claimed this was to help his compulsive gambling problem, when he was charged with multiple rapes. Both the court and the plea agreement told defendant that he would be sentenced to thirty

years, defendant waited until the week before sentencing to make the claim, and the officers contradicted his story. *State v. Denninos*, 155 Ariz. 459, 747 P.2d 620 (App. Div. 1 1987).

In *Sanford v. Phoenix Municipal Court*, 149 Ariz. 221, 717 P.2d 900 (1986), the defendant agreed to plead guilty to another offense after the state said it believed it had to dismiss DWI charges. The Court found that the defendant was in fact prejudiced by the inducement to plead guilty when the state went ahead and refiled DWI charges at a later date. See also *State v. Romero*, 145 Ariz. 485, 702 P.2d 714, 716 (App. Div. 1 1985) ("Inducements for a guilty plea are binding upon the state."); *State v. Lamas*, 143 Ariz. 564, 694 P.2d 1178 (1985).

In *State v. Chudy*, 146 Ariz. 385, 387, 706 P.2d 397, 399 (App. Div. 1 1985), the court quoted *Hamilton, supra*, and affirmed that "claims concerning inducements to enter plea, made after the plea is entered are meritless if the record shows the trial judge's *Boykin* questioning and a defendant's responses, at the time of change of plea." See generally *State v. Hayes*, 112 Ariz. 4, 536 P.2d 692 (1975).

In *State v. Hayes*, 112 Ariz. 4, 536 P.2d 692 (1972), the appellate court found that the trial court knew the defendant's averment that no promises had induced the plea was merely an empty averment. Promises had been given; therefore the plea was involuntary.

E. Determine Knowing And Intelligent Waiver

Rules 17.2 and 17.3 require that the record show that the plea was made intelligently and knowingly with an understanding of the consequences of the plea. *State v. Lamas, supra*. Before accepting the plea, the court must determine that the defendant understands the rights he is waiving. *State v. King*, 157 Ariz. 508, 759 P.2d 1312 (1988). The record of the trial judge's exchange with the defendant is not the sole method to determine the intelligence of the defendant's plea. A determination of the defendant's knowledge of his rights can be made on the basis of the entire record. *State v. Wesley*, 131 Ariz. 246, 248-49, 640 P.2d 177, 179-80 (1982); *State v. Duggan*, 112 Ariz. 157, 540 P.2d 122 (1975).

When the record reflects the court's failure to advise the defendant of a right, the appellate court will sometimes remand the case to the trial court to determine whether the defendant was actually aware of the right. *State v. Fox*, 112 Ariz. 375, 542 P.2d 800 (1975); *State v. Munoz*, 25 Ariz.App. 350, 543 P.2d 471 (App. Div. 1 1975); *State v. Hickey*, 110 Ariz. 527, 521 P.2d 614 (1974). See also *State v. Crews*, 25 Ariz.App. 170, 541 P.2d 961 (App. Div. 1 1975). In *Crews*, the court failed to inform defendant of his right to plead not guilty. The plea was held valid because the trial judge had informed defendant of other rights, including the privilege against self-incrimination. The right against self-incrimination was viewed as encompassing the right not to convict oneself by an admission of guilt. Accord *State v. Gourdin*, 156 Ariz. 337, 751 P.2d 997 (App. Div. 2 1988) (remand not necessary even though court didn't ask about coercion).

F. Find Aggravating Circumstances And Impose Sentence

If the sentence the plea agreement called for is greater than the presumptive sentence, the court must find aggravating circumstances. *State v. Williams*, 131 Ariz. 411, 641 P.2d 899 (App. Div. 1 1982). For example, in *State v. Holstun*, 139 Ariz. 196, 677 P.2d 1304 (App. Div. 2 1983), the trial judge erred in sentencing the defendant to a term stipulated in the plea agreement that was in excess of the presumptive term without stating for the record the aggravating and mitigating factors. In light of *Blakely v. Washington*, 542 U.S. 296 (2004), however, aggravating circumstances must be found by a

jury unless the defendant admits to aggravating circumstances or waives his right to a jury trial on sentencing enhancements. *State v. Brown*, 212 Ariz. 225, 231, 129 P.3d 947, 953 (2006).

The judge should find mitigating circumstances if the sentence is less than the presumptive. In *State v. Dowd*, 139 Ariz. 542, 679 P.2d 565 (App. Div. 1 1984), pursuant to a plea agreement, the appellant entered a plea of guilty whereby he would be sentenced to seven years imprisonment. The presumptive term for this crime (possession with a prior conviction) was 10.5 years. The judge failed to state specific reasons for imposing anything other than the presumptive sentence as required by A.R.S. § 13-702(C). The judge should have stated for the record the mitigating factors despite the stipulated sentence. The appellate court noted that the better practice, when the judge forgets to specifically articulate his reasons for imposing anything other than the presumptive sentence, is for counsel to remind the judge of the need to articulate reasons and acquaint the judge with the mitigating circumstances that justified the sentence. See also *State v. Ybarra*, 149 Ariz. 118, 716 P.2d 1055 (App. Div. 2 1986); *State v. Travis*, 150 Ariz. 45, 721 P.2d 1172 (App. Div. 1 1986).

Even if the plea agreement calls for a specific number of years in prison, the court cannot impose a correct sentence and then set the maximum amount of time that the defendant can be incarcerated. *State v. Harris*, 133 Ariz. 30, 648 P.2d 145 (App. Div. 2 1982) (plea involuntary).

G. Ensure the Ends of Justice are Served

The trial court must review the terms of the plea agreement to ensure the "ends of justice and protection of the public" are served by the disposition of the case as set forth in the agreement. *State ex rel Bowers v. Superior Court*, 173 Ariz. 34, 39, 839 P.2d 454, 459 (App. Div. 1 1992), disapproved on other grounds in *Espinoza v. Martin, infra*.

A judge may not add procedural barriers to the parties right to negotiate a plea agreement that precludes individualized consideration on the merits of an agreement. *State v. Darelli*, 205 Ariz. 458, 72 P.3d 1277 (App. Div. 1 2003). A policy rejecting all plea agreements that stipulate to a particular sentence falls within this prohibition. *Espinoza v. Martin*, 182 Ariz. 145, 894 P.2d 688 (1995).

III. PROSECUTOR'S RESPONSIBILITIES

A. Assist Court

A defendant has no right to a plea offer from the prosecution and thus has no ground to complain about the terms of any such offer. *State v. McInelly*, 146 Ariz. 161, 704 P.2d 291 (App. Div. 1 1985). However, if one is offered, a prosecutor should ensure that the offer was conveyed to the defendant in order to avoid a claim of ineffective assistance of counsel. *State v. Donald*, 198 Ariz. 406, 10 P.3d 1193 (App. Div. 1 2000).

A prosecutor may withdraw a plea agreement prior to acceptance and offer a harsher agreement. *State v. Felix*, 153 Ariz. 417, 737 P.2d 393 (App. Div. 2 1986). Once a plea bargain has been reached both the prosecutor and defense attorney have an affirmative duty to assist the court in assuring that the appropriate procedural requirements are met. *State v. Rodriquez*, 112 Ariz. 193, 540 P.2d 665 (1975); *State v. Mendiola*, 23 Ariz.App. 251, 532 P.2d 193 (App. Div. 1 1975); *State v. Tiznado*, 23 Ariz.App. 483, 534 P.2d 291 (App. Div. 2 1975). The failure of the defense attorney to aid the court in properly accepting the plea may be noted on appeal and may influence the court's decision on review. *Mendiola* and *Tiznado*, *supra*. It is also the duty of both sides to insure that the agreement filed with

the court contains the exact and complete agreement. *State v. Cornwall*, 114 Ariz. 550, 562 P.2d 723 (1977).

B. Keep Bargain

Once the State has entered into an agreement with a defendant, the State must honor its agreement. "The failure of the state to live up to a plea bargain can be a denial of due process." *Sanford v. Phoenix Municipal Court*, 149 Ariz. 221, 717 P.2d 900 (1986). *State v. Stadie*, 112 Ariz. 196, 540 P.2d 668 (1975), cert. denied 425 U.S. 974.

However, only the prosecutorial branch of the state is bound by an agreement. *State v. Rogel*, 116 Ariz. 114, 568 P.2d 421 (1977). In *Rogel*, the prosecutor, as part of the plea negotiation, had agreed to make no recommendation as to the defendant's sentence. On appeal, the defendant claimed that the plea agreement had been breached by the state because a presentence report filed with the court contained the investigating officers' statements recommending a lengthy sentence. The court rejected the defendant's claim, stating that a plea agreement that does not include a stipulated sentence does not prohibit the police from voicing an opinion about the sentence when specifically asked do so by probation officers. The plea agreement binds only the parties to the agreement and others who participated in the negotiations. Thus, when the state agrees to recommend a specific sentence, the court is not bound to accept that recommendation. However, the defendant must be clearly advised that the court is not bound by the recommendations of the county attorney. But see *State v. Davis*, 123 Ariz. 564, 601 P.2d 327 (App. Div. 1 1979).

C. Forfeitures

There is an important distinction between an agreement which contains a recommended sentence and one which contains a specific sentence.

When an agreement contains a specific sentence, both the court and the State are bound to impose that sentence and no more. *State v. Cagnina*, 113 Ariz. 387, 555 P.2d 345 (1976). If a forfeiture proceeding is going on and the plea agreement is silent about the forfeiture while imposing specific penalties, the prosecutor cannot forfeit the car. This was true even though the defense attorney told the criminal deputy he would not fight the forfeiture, even though he later fought the forfeiture with civil deputies. *Matter of 1972 Chevrolet Corvette, Etc*., 124 Ariz. 521, 606 P.2d 11 (1980).

D. Prosecutor Cannot Violate Spirit Of The Agreement

Prosecutors must abide by the terms and spirit of their plea agreements, and sentencing judges must require them to do so. *State v. Romero*, 145 Ariz. 485, 702 P.2d 714 (App. Div. 1 1985). For example, where a plea agreement stated that the "State will not present an aggravation hearing," and the prosecutor made a sentence recommendation to the probation officer, the court held this to be a breach of the spirit of the agreement and remanded the case for re-sentencing. *State v. Davis*, 123 Ariz. 564, 601 P.2d 327 (App. Div. 1 1979); *State v. Sodders*, 130 Ariz. 23, 633 P.2d 432 (App. Div. 1 1981) (argument that the defendant instigated the robbery and deserved 38 years violated an agreement not to present evidence); *State v. Gayman*, 127 Ariz. 600, 623 P.2d 30 (App. Div. 1 1981) (telling the probation officer the defendant should get a long time and arguing other evidence contradicted defense mitigation evidence violated an agreement not to provide aggravating evidence). But see *State v. Sasak*, 178 Ariz. 182, 871 P.2d 729 (App.Div. 1 1993) (agreement's prohibition against

consecutive prison terms did not prohibit state from recommending aggravated sentence); *State v. Ross*, 166 Ariz. 579, 804 P.2d 112 (App. Div. 1 1990) (agreement not to take position on sentencing did not prohibit state from cross-examination of mitigation witness).

On the other hand, if the defense violates the plea agreement, the appellate court has held the prosecutor's response to be invited error. *State v. Kelly*, 126 Ariz. 193, 613 P.2d 857 (App. Div. 1 1980). However, see *Gayman, supra*, where the court held it was a violation for the prosecution to correct defense misrepresentations because the prosecution couldn't present aggravation but the defense could present mitigation. The prosecution giving the probation officer witness' reports did not violate a no recommendation agreement. *Kelly, supra*. The prosecutor may oppose a sentence reduction, and may also may answer the judge's questions, if the defense makes no objection. *State v. Rosenbaum*, 123 Ariz. 551, 601 P.2d 314 (App. Div. 2 1979). See also *State v. Webb*, 140 Ariz. 321, 681 P.2d 473 (App. Div. 2 1984).

IV. DEFENDANT'S COMPETENCY

NOTE: Defendant's competency is thoroughly covered in much greater detail in Volume IV of the Prosecutor Manual Series. Here is a brief summary.

A. Standard

The competency required to enter a valid guilty plea is higher than the standard of an accused's competency to stand trial. *State v. Anzivino*, 148 Ariz. 593, 716 P.2d 50 (App. Div. 1 1985); *State v. Sims*, 118 Ariz. 210, 575 P.2d 1236 (1978). An appellate court will look for "reasonable evidence" to support a competency determination. *State v. Murtaugh*, 209 Ariz. 19, 97 P.3d 844 (2004).

B. Voluntary, Intelligent Plea Is Usually Competent

Normally, a finding by the trial court that the plea was voluntarily and intelligently entered is a sufficient finding of competency. *Sims, supra*. *State v. DeNistor*, 143 Ariz. 407, 694 P.2d 237 (1985).

The test for determining competency to plead guilty "is not whether defendant acted in his own best interests, but whether he possessed the ability to make a reasoned choice and to understand the consequences of that decision." *State v. Brewer*, 170 Ariz. 486, 495, 826 P.2d 783, 792 (1992), citing *State v. Bishop*, 162 Ariz. 103, 108, 781 P.2d 581, 586 (1989). A mentally ill defendant is not competent to plead guilty if his illness "substantially impair[s] his ability to make a reasoned choice among the alternatives presented to him and understand the nature of the consequences of his plea." *Id.*

If the defendant was aware of the contents of the agreement after his attorney explained them to him and the court asked whether he fully understood the contents of the agreement, the voluntariness of the entry of the guilty plea will be upheld even if the defendant is unable to read English. *State v. Levario*, 118 Ariz. 426, 577 P.2d 712 (1978).

C. Specific Findings Of Competency

1. Not Always Required

If the defendant has previously been determined competent to stand trial and to assist in his defense

(a hearing and determination under A.R.S. §13-1621), a specific determination of competency to plead guilty does not need to be made in every case. *Anzivino, supra*. The unusual circumstances requiring a separate determination of competency to plead guilty would be those facts which indicate real doubt as to the defendant's competency to make a reasoned choice among alternatives. *State v. Thompson*, 113 Ariz. 1, 545 P.2d 925 (1976).

2. Required if Defendant Raises Issue of Insanity or Incompetency

Once a defendant has raised the issue of insanity or incompetency, the court is required to make a specific finding on competency to plead guilty. *Anzivino, supra*; *State v. Robinson*, 111 Ariz. 153, 526 P.2d 396 (1974).

D. Established From Trial Competency Hearing

The information used to establish competency to plead guilty may be derived from the trial competency hearing. *State v. Byrd*, 22 Ariz.App. 375, 527 P.2d 777 (App. Div. 1 1974); *State v. Jackson*, 22 Ariz.App. 148, 524 P.2d 1321 (App. Div. 1 1974).

V. ACCEPTANCE OF PLEA

A. Court Is Not Required To Accept Plea

Rule 17.1 describes the method by which a court accepts a plea. The court is not required to accept a plea, but is authorized to do so. *State v. DeNistor*, 143 Ariz. 407, 694 P.2d 237 (1985).

B. Agreement Must Be In Writing And Signed By Defendant

If no written agreement has been filed, or if it is not signed by defendant, the guilty plea is invalid. *State v. Lee*, 112 Ariz. 283, 541 P.2d 383 (1975). The written agreement filed with the court must contain an accurate and complete statement of the agreement. Oral agreements made during the plea negotiations which are not subsequently reduced to writing usually do not become part of the agreement. *State v. Cornwall*, 114 Ariz. 550, 562 P.2d 723 (1977). But see *Sanford v. Phoenix Municipal Court*, 149 Ariz. 221, 717 P.2d 900, (1986) (defendant's reliance on oral "plea agreement" held to be sufficient); *State v. Romero*, 145 Ariz. 485, 702 P.2d 714 (App. Div. 2 1985) (oral representations by prosecution incorporated into written agreement and held to be just as binding).

C. No Specific Language From Court To Accept Plea

The court need only indicate that it approves the agreement.

In *State v. McKesson*, 27 Ariz.App. 500, 556 P.2d 801 (App. Div. 2 1976), the court failed to state that the "court accepts" the plea. Instead, the judge stated that "defendant enters" plea. The appellate court noted that the court had indicated acceptance of the plea by setting a sentencing date. Though imprecise, the language of the trial court was held to be sufficient to indicate acceptance of the plea. However, see *State v. Hawkins*, 134 Ariz. 403, 656 P.2d 1264 (App. Div. 1 1982), where the trial court accepted, yet ignored the plea agreement, and took the liberty of substituting a different restitution amount in the final order. The Court of Appeals held that where a plea agreement or a provision thereof is rejected by the trial court, it is obliged to give the defendant an opportunity to withdraw the plea.

D. Effect Of Plea Acceptance

Jeopardy attaches once the plea is accepted, and the plea can't be set aside absent provisions covering that contingency, even if a defendant's extensive record or pending charges are discovered. *Dominguez v. Meehan*, 140 Ariz. 329, 681 P.2d 912 (App. Div. 2 1983) *Lombrano v. Superior Court*, 124 Ariz. 525, 606 P.2d 15 (1980); *Smith v. Superior Court*, 130 Ariz. 210, 635 P.2d 498 (1981).

If the defendant pleads guilty before the state alleges prior convictions, the state will not be permitted to do so at sentencing because jeopardy has already attached. *Parent v. McClennen*, 206 Ariz. 473, 80 P.3d 280 (App. Div. 1 2003).

The easiest way to avoid the problem is for the judge to delay accepting the plea until the time of the Rule 26.2(c) judgment of guilt. A form might be helpful if it contains an averment that the plea agreement is based on the defendant's avowal that the defendant has no undisclosed convictions or pending charges, and the agreement is null and void if that avowal is not correct.

E. Judge Not Bound To Accept Plea Sentence

The judge does not have to accept the sentence which the plea agreement calls for. The judge does not need to review the presentence report before rejecting the plea agreement. *State v. Superior Court*, 183 Ariz. 327, 903 P.2d 635 (App. Div. 1 1995).

If the judge chooses not to accept the sentence, the judge must warn the parties he will not impose the agreed upon sentence and allow the aggrieved party a chance to withdraw. *State v. Williams*, 131 Ariz. 411, 641 P.2d 899 (App. Div. 1 1981). This may be a way out if the judge accepted a plea and priors were discovered. See *DeNistor*, *supra*.

The judge may notify the defendant that he intends to impose a harsher sentence and give him a chance to withdraw. See generally *Williams v. Superior Court*, 130 Ariz. 209, 635 P.2d 497 (1981). See also *State v. Faunt*, 139 Ariz. 111, 677 P.2d 274 (1984); State v. Corno, 179 Ariz. 151, 876 P.2d 1186 (App. Div. 1 1994)(state also permitted to withdraw from plea agreement if judge rejects sentence).

Failure to tell a defendant of his Rule 17.4(e) right to change judge after rejection of the proposed sentence does not invalidate defendant's decision to go ahead and be sentenced. *State v. Barnett*, 153 Ariz. 508, 738 P.2d 783 (App. Div. 1 1987).

VI. WITHDRAWAL OF PLEA

A. Prior To Court Acceptance

Rule 17.4 provides that a plea agreement can be revoked by either party any time before the court accepts the agreement. *Smith v. Superior Court*, 130 Ariz. 210, 635 P.2d 498 (1981). See also *State v. Webb*, 140 Ariz. 321, 681 P.2d 473 (App. Div. 2 1984); *State v. DeNistor*, 143 Ariz. 407, 694 P.2d 237 (1985).

If the judge does not accept the plea agreement before sentencing, jeopardy has not attached and he may reject the plea agreement if he finds the sentencing disposition unacceptable, the factual basis inadequate, or other legitimate reasons. *Aragon v. Wilkinson*, 209 Ariz. 61, 97 P.3d 886 (App. Div. 1 2004). However, the court may not reject a plea agreement in the absence of individualized consideration. *Espinoza v. Martin*, 182 Ariz. 145, 894 P.2d 688 (1995); *State v. Darelli*, 205 Ariz. 458, 72 P.3d 1277 (App. Div. 1 2003).

The defendant is not entitled to withdraw from a plea agreement prior to the court's acceptance when he failed to appear for sentencing. *State v. Taylor*, 196 Ariz. 549, 2 P.3d 108 (App. Div. 1 1999).

B. After Court Acceptance

Once a plea has been accepted, a motion to withdraw the plea is solely within the court's discretion. See Rule 17.5. The guilty plea should be revoked only for the most compelling reason. *State v. McFord*, 125 Ariz. 377, 609 P.2d 1077 (App. Div. 1 1980). In the absence of an abuse of that discretion, the appellate court will not overturn the ruling on the motion to withdraw. *DeNistor, supra*; *State v. McKesson*, 27 Ariz.App. 500, 556 P.2d 801 (App. Div. 2 1976). There is no absolute right to withdraw a plea after acceptance by the court even though the motion has been made prior to sentencing. *State v. Dixon*, 111 Ariz. 92, 523 P.2d 789 (1974); *Foster v. Irwin*, 196 Ariz. 230, 995 P.2d 272 (2000).

The State generally does not have the right to withdraw from the plea agreement after the court accepts it. *Aragon v. Wilkinson*, 209 Ariz. 61, 97 P.3d 886 (App. Div. 1 2004). This includes deferred prosecution agreements. *State v. Platt*, 162 Ariz. 414, 783 P.2d 1206 (App. Div. 2 1989).

C. Change of Judge

The defendant may move for a change of judge if the guilty plea is withdrawn after submission of presentence report. *Hill v. Hall*, 194 Ariz. 255, 980 P.2d 967 (App. Div.1 1999). However, that right is not available when the judge rejects the agreement prior to the submission of the presentence report, *State v. Superior Court*, 183 Ariz. 327, 903 P.2d 635 (App. Div.1 1995), or the judge has heard the victim's statements at the change-of-plea hearing and the statement has influenced the court's decision. *Scarborough v. Superior Court*, 181 Ariz. 283, 889 P.2d 641 (App. Div.1 1995). A defendant who exercises this right is not entitled to another change of the judge to whom the case is then assigned. *Fiveash v. Superior Court*, 156 Ariz. 422, 752 P.2d 511 (App. Div.2 1988).

D. Use of Statements at Trial

The state may not use at trial a defendant's statements made during plea negotiations or at the change-of-plea hearing unless the defendant explicitly waives that right. *State v. Campoy*, 220 Ariz. 539, 207 P.3d 792 (App. Div. 2 2009).

VII. ISSUES ON APPEAL

A. Non-Jurisdictional Defects And Defenses

A valid plea of guilty generally results in the waiver of all non-jurisdictional defects and defenses. *State v. Hamilton*, 142 Ariz. 91, 94, 688 P.2d 983, 986 (1984); *State v. Bazan*, 119 Ariz. 260, 580 P.2d 721 (1978) (waiver of right to appeal the denial of a motion to suppress); *State v. Webb*, 140 Ariz. 321, 681 P.2d 473 (App. Div. 2 1984); *State v. Johnson*, 116 Ariz. 561, 570 P.2d 503 (App. Div. 1 1977) (waiver of insanity defense). Non-jurisdictional defects include all circumstances irrelevant to the establishment of a defendant's factual guilt. *State v. Tramble*, 116 Ariz. 249, 568 P.2d 1147 (1977).

B. Burden Of Proof

The defendant carries the burden of proving a breach of the terms of the agreement. *State v. Stone*, 111 Ariz. 62, 64, 523 P.2d 493, 495 (1974); *State v. Romero*, 145 Ariz. 485, 702 P.2d 714 (App.

Div. 1 1985). If the state alleges that the defendant failed to comply with the plea agreement, the court must hold a hearing where the state has the burden to prove the failure by a preponderance of the evidence. *State v. Warren*, 124 Ariz. 396, 604 P.2d 660 (App. Div. 1 1979).

C. Adequate Factual Basis

If the appellate court finds that there is a factual basis for the plea, even though not specifically established by the trial court, the plea will be upheld. See generally *State v. Hamilton*, 142 Ariz. 91, 688 P.2d 983 (1984). If there is a factual basis for the plea on the extended record, the trial judge's omission is not fundamental error. The case will be governed by the doctrine of technical error and there will be no reversal on this point. See *State v. Rodriguez*, 112 Ariz. 193, 540 P.2d 665 (1975); *State v. Ybarra*, 149 Ariz. 118, 716 P.2d 1055 (App. Div. 2 1986); *State v. Sodders*, 130 Ariz. 23, 633 P.2d 432 (App. Div. 1 1981); *State v. Mendiola*, 23 Ariz.App. 251, 532 P.2d 193 (App. Div. 1 1975). If the appellate court cannot ascertain a factual basis, the plea will be vacated and the original charge will be reinstated. *State v. Carr*, 112 Ariz. 453, 543 P.2d 441 (1975). See also *State v. Ybarra*,149 Ariz. 118, 716 P.2d 1055 (App. Div. 2 1986).

VIII. OTHER SITUATIONS

A. No Contest Plea

The requirements for a valid guilty plea must also be met when a plea of no contest is entered pursuant to a plea negotiation. Rule 17 specifically provides that it applies to no contest pleas. The rules and requirements for a valid plea negotiation apply with equal force to an agreement under which a defendant agrees to plead no contest. See *State v. Anderson*, 147 Ariz. 346, 710 P.2d 456 (1985). *State v. McGhee*, 27 Ariz.App. 119, 551 P.2d 568 (App. Div. 1 1976); *State v. Bates*, 22 Ariz.App. 613, 529 P.2d 1207 (App. Div. 1 1975).

B. Submission On The Record

When the defendant agrees to submit the issue of guilt to the court solely on the basis of the police reports and transcript from the preliminary hearing, the court is not required to treat it as tantamount to a guilty plea. Instead, the court need only inform the defendant that he is waiving the right to a jury trial; the right to have the issue of guilt or innocence decided by the judge based solely upon the record submitted; the right to testify in his own behalf; the right to be confronted with the witnesses against him; the right to compulsory process for obtaining witnesses in his favor, and; the right to know the range of sentence and special conditions of sentencing. *State v. Avila*, 127 Ariz. 21, 24-25, 617 P.2d 1137, 1140-41 (1980).

C. Effect Of Vacated Plea - Double Jeopardy

An agreement vacated on appeal results in the reinstatement of the original charges that were dismissed as a result of the plea. *State v. Rodriguez*, 126 Ariz. 104, 612 P.2d 1067 (App. Div. 1 1980). Defendant waives double jeopardy issues when he moves to withdraw the plea. *State v. DeNistor*, 143 Ariz. 407, 694 P.2d 237 (1985); *Lombrano v. Superior Court*, 124 Ariz. 525, 606 P.2d 15 (1980).

D. Mistake Of Fact

If both parties are mistaken about an underlying fact, e.g. the availability of an out-of-state prison, the mistake of fact doctrine may apply to vacate the plea. *State v. Chavez*, 130 Ariz. 438, 439-40, 636 P.2d 1220, 1221-22 (1981).

E. Forfeitures And Plea Agreements

If the plea agreement fails to mention forfeiture proceedings, the plea will void any forfeiture proceedings. See *Matter of 1972 Chevrolet Corvette, Etc*., 124 Ariz. 521, 606 P.2d 11 (1980).

F. Enhanced Punishment-Notice and Basis

1. Notice

In *State v. Waggoner*, 144 Ariz. 237, 238-39, 697 P.2d 320, 321-22 (1985), the Arizona Supreme Court held that the state must allege sentencing enhancements in a timely manner so that the defendant knows the extent of the punishment he faces before he decides whether to accept a guilty plea.

The indictment alleged the defendant was on parole in a certain case number in one county. After conviction, the state proved the defendant was on parole in a different county. Enhanced punishment was not allowed because of the notice problem. *State v. Sammons*, 156 Ariz. 51, 749 P.2d 1372 (1988).

2. Burden of Proof

Under Rule 17.6, the trial court does not have to tell the defendant the possible range of sentence without a prior conviction when there is a prior conviction. "Knowledge of matters (not affecting the validity of the plea process) acquired after the plea which might indicate that the defendant would have been better off going to trial rather than entering a guilty plea, does not invalidate either an *Alford* plea or a normal plea of guilty." *State v. Fowler*, 137 Ariz. 381, 670 P.2d 1205 (App. Div. 1 1983).

When there is an allegation filed pursuant to A.R.S. § 13-604.02, charging that the defendant committed the offense while on parole or probation, it must be supported by reasonable evidence. *State v. Rickman*, 148 Ariz. 499, 715 P.2d 752 (1986). The evidence can be found anywhere in the extended record. *Waggoner, supra.*

G. Pre-1984 Class 6 Undesignated Prior Convictions

Two departments of Division One of the Court of Appeals interpret the 1984 amendment to A.R.S. § 13-702(H) differently. In *State v. Schroeder*, 147 Ariz. 365, 710 P.2d 475 (App. Div. 1 1985), Division One held that A.R.S. § 13-702(H) applied retroactively and that if an offense had not been designated a misdemeanor by August 3, 1984, it was a felony for prior conviction purposes. However, in *State v. Fallon*, 151 Ariz. 188, 726 P.2d 604 (App. Div. 1 1986), another department disagreed with the *Schroeder* court, holding that the amendment to A.R.S. § 13-702(H) did not serve to designate previously undesignated offenses to felonies.

H. Enhanced Punishment Guilty Pleas

Post-*Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000), and *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531 (2004), the trial court is still the fact finder for prior convictions, but other sentencing enhancements must be submitted to the jury unless the defendant admits to the enhancement or waives the right to a jury trial. *State v. Cons*, 208 Ariz. 409, 94 P.3d 609 (App. Div. 2 2004). The United States Supreme Court held that

> When a defendant pleads guilty [and necessarily waives the right to a jury trial], the State is free to seek judicial sentence enhancements so long as the defendant

> either stipulates to the relevant facts or consents to judicial factfinding. If appropriate waivers are procured, States may continue to offer judicial factfinding as a matter of course to all defendants who plead guilty.

Blakely, 542 U.S. at 309, 120 S.Ct at 2541.

"[T]he statutory maximum sentence for *Apprendi* purposes in a case in which no aggravating factors have been proved to a jury beyond a reasonable doubt is the presumptive sentence established" by statute. *State v. Martinez*, 210 Ariz. 578, ¶ 17, 115 P.3d 618, 623 (2005). Accordingly, a plea agreement that stipulates or permits an aggravated sentence must also waive the right to a jury trial on aggravating circumstances in order for the trial court to sentence the defendant to an aggravated term. See *State v. Ward*, 211 Ariz. 158, 118 P.3d 1122 (App. Div. 1 2005), *State v. Brown*, 210 Ariz. 534, 539, ¶ 12, 115 P.3d 128, 133 (App. Div. 2 2005).

I Guilty Pleas Dependent on Pleas by Others

The state may condition the acceptance of a guilty plea on all co-defendants pleading guilty. *State v. Solano*, 150 Ariz. 398, 402, 724 P.2d 17, 21 (1986). Such plea bargains are permissible when "1) the prosecutor acted in good faith; 2) there was a factual basis for the pleas; 3) the pleas were voluntary; 4) the promise of leniency was of significant concern to each of the defendants and 5) no other facts impermissibly influenced the defendants to plead guilty." Accord *State v. Tietjens*, 151 Ariz. 560, 729 P.2d 914 (1986). If the court refuses to accept one plea, the court must reject all other pleas.

The essence of a package deal claim is that defendant's plea was involuntary because of promises to others. Defendant's wife plead guilty. As part of defendant's guilty plea the wife was allowed to withdraw her plea and got a lesser sentence. Defendant's plea was held to be involuntary. *State v. Carranza*, 156 Ariz. 188, 751 P.2d 38 (App. Div. 1 1988).

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